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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 262

DEAN OIL COMPANY,

Petitioner,

vs.

AMERICAN OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Dean Oil Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 20, 1958, which affirmed a judgment dismissing petitioner's action on the basis of respondent's defense of the statute of limitations.

Opinions Below.

The opinion of the District Court on granting petitioner's motion to strike defense of statute of limitations is reported 147 Fed. Supp. 414 at page 419 (pertinent excerpt printed in Appendix below, p. 17a). The opinion of the District Court on denial of respondent's motion to vacate order striking said defense and to dismiss the action is not officially reported (but is printed in Appendix below, p. 23a).

The District Court filed no opinion on granting respondent's motion (based on decision of the United States Court of Appeals for the Third Circuit in *Gordon* v. *Loew's Incorporated*, 247 F. 2d 451) to dismiss the action. The opinion of the Court of Appeals herein is reported 254 F. 2d 816 (and is printed in the Appendix hereto, *infra* p. 18).

Jurisdiction.

The date of the judgment of the Court of Appeals sought to be reviewed is May 20, 1958, and the time of entry of the judgment is the same date. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1) and §2101 (c).

Questions Presented.

1. Whether the shortening of the period of the statute of limitations by judicial decision of the federal courts in such manner as to bar petitioner's pending action (which action was instituted within the period of limitations for such action as established at the time of institution of the action and for many years prior thereto) deprives petitioner of property contrary to the due process clause of the Fifth Amendment of the Constitution of the United States or is such a shocking departure from the usual course of judicial proceedings as to warrant an exercise of this Court's power of supervision.

2. Whether the period of the statute of limitations of New Jersey for the bringing of an action for statutory treble damages for a tortious injury to a person in his business or property was in fact shortened from six to two years by judicial decision by that state's highest court; and whether the decision of the state court required or in any

respect warranted the decision of the federal courts for the District of New Jersey shortening the period of limitations for the bringing of an action for treble damages under the provisions of the Robinson-Patman amendments of the Clayton Act from six to two years in such manner as to bar and destroy actions already pending in the federal courts.

Constitutional Provision and Statutes Involved.

The constitutional provision involved is the Fifth Amendment of the Constitution of the United States. The federal statutes involved are 15 U. S. C. §13, 15 and 15b (49 Stat. 1526; 38 Stat. 731; 69 Stat. 283) and 28 U. S. C. §1652 (1 Stat. 92). The New Jersey statutes involved are N. J. S. 2A:14-1, 2, 3 and 10; and N. J. S. 2A:42-38. The pertinent text is printed in the Appendix, *infra*, p. 15.

Statement of the Case.

Petitioner, Dean Oil Company (hereinafter called Dean), a New Jersey corporation, was engaged in the sale and distribution of gasoline within the state of New Jersey to so called "unbranded" dealers and service stations. Respondent, American Oil Company (hereinafter called American), a Maryland corporation authorized to do business in New Jersey, was engaged in the shipment, transportation and sale of gasoline in Interstate Commerce, in the course of which it transported gasoline from other states to its marine terminal at Carteret, New Jersey, from which point it made sales of gasoline (such sales being admittedly in interstate commerce within the meaning of the Robinson-Patman Act). Dean was a regular customer of American, purchasing almost daily at American's marine terminal, from which point Dean transported the gasoline and delivered it to Dean's customers throughout Northern New

Jersey. American also sold gasoline to other distributors who were in direct competition with Dean and whose dealers were in direct competition with those supplied by Dean. Throughout the course of these dealings American continually discriminated against Dean and in favor of the other distributors and dealers—as to prices charged, discounts and allowances given, and services and facilities furnished—which discrimination is claimed to be violative of the Robinson-Patman amendments of the Clayton Act (15 U. S. C. §13) and to have injured Dean in its business and property.

Section 4 of the Clayton Act (15 U. S. C. §15) affording a civil remedy to one injured by violation of the antitrust laws confers exclusive jurisdiction on the federal courts expressly providing that the action be brought "in any district court of the United States in the district in which the defendant resides or is found or has an agent." American being found (authorized to do business) and having an agent in New Jersey, Dean brought its action in the United States District Court for the District of New Jersey.

Dean's action seeking to recover threefold the damages sustained by it in its business and property was commenced January 5, 1956, and its complaint alleges the period of actionable discrimination as January 6, 1950 to June 30, 1953—the entire period thus being more than two years but less than six years prior to the commencement of the action. American by its answer and amended answer, beside setting up several defenses not here pertinent, pleads the New Jersey two year statute of limitations (N. J. S. 2A:14-10) applying to actions "brought for any forfeiture upon any penal statute."

American's defense based upon the New Jersey two year statute of limitations was considered by the District Court on three separate occasions:

(1) In October 1956 motion was made on behalf of Dean to strike out this defense. In December 1936 the District Court granted this motion, filing an opinion pointing out that the private antitrust suit is an action on the case for a tortious injury to the rights of another and hence governed by N. J. S. 2A:14-1 requiring such tort actions to be commenced within six years; and also that the federal four year statute of limitations (15 U. S. C. Sec. 15b) did not take effect until two days after Dean's action was instituted (Appendix below, p. 17a).

(2) In April 1957 motion was made on behalf of American to reconsider and vacate the striking of this defense and to grant judgment dismissing the action on the basis of this defense. Such motion was based upon the contention of American that the decision of the Supreme Court of New Jersey in January 1957 in *Addiss* v. *Logan Corporation* had now determined that the statute of limitations in this type of action was two years. The state court in *Addiss* held that an action under the state Rent Control Act, which provides that a landlord in violation "shall forfeit to his tenant a sum equal to three times the amount of any rent received by him in excess of the lawful base rental," is governed by the two year statute of limitations governing actions for a forfeiture upon a penal statute. The District Court denied American's motion, filing an opinion holding that the decision in *Addiss* in no way affects the long standing determination of the federal courts of this district and circuit as to the nature of a private antitrust suit under the Clayton Act —that it is an action on the case for a tortious injury to the rights of another and hence within the six year statute of limitations governing actions of such nature (Appendix below, p. 23a).

(3) In October 1957 motion was again made on behalf of American for judgment dismissing the action upon the basis of its defense of statute of limitation. Such motion was based upon a decision of the United States Court of Appeals for the Third Circuit in July 1957 in *Gordon* v. *Lovic's Incorporated*, which held that the New Jersey two year statute of limitations governed a private action under the Sherman and Clayton Acts for treble damages for injury resulting from a combination in restraint of trade. Dean opposed this motion, not only on the grounds theretofore successfully argued, but also raising the constitutional question of due process (Appendix below, pp. 28a to 32a). The District Court, without opinion, granted American's motion and entered judgment dismissing Dean's action (Appendix below, p. 32a).

On the appeal Dean argued not only that the decision in *Gordon* should be overruled or distinguished but also the constitutional question of due process. The United States Court of Appeals for the Third Circuit affirmed the judgment dismissing Dean's action (Opinion, *infra* p. 18).

Argument.

(1) The decision sought to be reviewed does not concern the merits of Dean's substantive rights, but (assuming that Dean has a good cause of action) it bars Dean's right of action upon the procedural ground that suit was not brought within two years, the period allowed by N. J. S. 2A: 14-10, the state statute of limitations governing actions brought for any forfeiture upon any penal statute.

At the time when Dean's cause of action arose and at the time Dean's action was instituted the law had long been well established in the District of New Jersey and the Third Circuit that the nature of the private antitrust

suit was an action on the case for tortious injury to the rights of another and that the time for bringing such a suit was six years under N. J. S. 2A:14-1 (formerly N. J. S. 2:24-1) governing this type of tort action. In 1906 the United States Supreme Court in *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 27 S. Ct. 65, had determined that an action for treble damages under the antitrust laws was not barred by the federal five year statute of limitations governing suits for any penalty or forfeiture nor by the Tennessee one year statute of limitations governing actions for statutory penalties, but was an action for recovery of damages by a person injured in his business or property. In 1915 the Circuit Court of Appeals for the Third Circuit in *Buckeye Powder Co.* v. *DuPont De Nemours Powder Co.*, 223 Fed. 881, held upon a plaintiff's appeal from a judgment of the United States District Court for the District of New Jersey that the trial court had correctly charged the jury that the New Jersey six year statute of limitations applied in a private antitrust action brought in the District of New Jersey; and this was affirmed by the United States Supreme Court under the same name, 248 U. S. 55 (at p. 63), 39 S. Ct. 38. In 1922 the United States District Court for the District of New Jersey in *Shelton Electric Co.* v. *Victor Talking Machine Co.*, 277 Fed. 433, a private antitrust suit, held that the action was for damages for an injury and not for a forfeiture or penalty, and that the New Jersey six year statute of limitations *and not the New Jersey two year statute of limitations* applied. In 1937 the Circuit Court of Appeals for the Third Circuit in *H. J. Jaeger Research Laboratories* v. *Radio Corporation of America*, 90 F. 2d. 826, citing *Buckeye* and *Shelton*, held that the New Jersey six year statute of limitations applied to bar a private antitrust

action, which was considered by the court as an action on the case to recover damages for a tort committed without force. In 1939 the Third Circuit in *Williamson* v. *Columbia Gas & Electric Corp.*, 110 F. 2d 15, held that a private antitrust suit was an action on the case for tortious injury within the Delaware statute of limitations and not an action of debt on a specialty for a statutory penalty, pointing out the unliquidated character of a claim for damages under the antitrust laws as recognized by this Court in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 552, 22 S. Ct. 431 (1901). In 1953 the United States District Court for the district of New Jersey in *Florida Wholesale Drug, Inc.* v. *Ronson Art Metal Works, Inc.*, 110 Fed. Supp. 573, again reiterated that the New Jersey six year, and not the two year, statute of limitations applied in a private antitrust action.

Such was the established and existing rule of procedure when Dean's cause of action arose and when Dean's action was instituted--Dean was required to institute its action within six years, not within two years. Dean having complied with the established and existing rule of procedure, we now find its suit dismissed because it failed to comply with a rule of procedure which did not exist when the cause of action arose or when the suit was instituted. We respectfully submit that this result is shocking to the conscience and violative of Dean's constitutional rights.

The period of statutes of limitations may be changed, but subject to restrictions dictated by justice and fairness and by the due process clauses of the Constitution. The period may be lengthened, but a cause of action already barred may not be revived by action of the Congress (*Stewart* v. *Keyes*, 295 U. S. 403, 55 S. Ct. 807 (1935)), or by the action of the state legislature (*State of New Jersey*

v. *Standard Oil Company*, 5 N. J. 281, 294 (1950)), or judiciary (*Markey* v. *Robert Hall Clothes of Paterson*, 27 N. J. Super. 417, 421 (Cty. Ct. 1953)). Conversely, the period may be shortened, but not in such manner as to deprive a person of all existing remedies for the enforcement of his right unless provision is made allowing such person a reasonable time for the commencement of his action before the shortened period takes effect to bar him. *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139, 33 S. Ct. 1033 (1913); *Terry* v. *Anderson*, 95 U. S. 628, 24 L. Ed. 365 (1877); and see *Sohn* v. *Waterson*, 84 U. S. 596, 21 L. Ed. 737 (1873). It is to be noted that in enacting the new four year federal statute of limitations on antitrust actions (15 U. S. C. §15b) the Congress recognizes this principle of due process and allows a period of six months after the date of enactment within which to commence suit upon existing causes of action not otherwise barred. Dean commenced its action within this six months period to preserve its rights under the six year statute of limitations in effect in New Jersey at the date of the enactment of 15 U. S. C. §15b.

There can be no question but that judicial action is no less subject to the restrictions of due process than legislative action. *Shelley* v. *Kraemer*, 334 U. S. 1, 16, 68 S. Ct. 836 (1948). The question here presented is whether the judicial shortening of the period of limitations by retroactive application of the 1957 decision of the Court of Appeals in the *Gordon* case so as to bar Dean's pending action is not similarly unconstitutional. Here we have been and will undoubtedly be met with the contention that the decision of the Court of Appeals did not change the law but merely pronounced that which always was the law —this notwithstanding the line of contrary decisions in this district and circuit from 1915 through 1953. The famil-

iar doctrine that a court in overruling prior decisions does not change the law but merely expounds that which always was the true rule of law, particularly when applied to matters of procedure, quite obviously has its limitations based upon fairness and justice and upon the due process clauses of the Constitution of the United States. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451 (1930); and see *Gelpcke* v. *Dubuque*, 68 U. S. 175, 17 L. Ed. 520 (1864).

It is respectfully submitted that changes in procedural requirements (although effected by judicial decision which holds that the changing procedure "always was the law") cannot constitutionally be given retroactive effect so as to deny a party the opportunity to be heard and to prosecute or defend his substantive right, and that such changes in procedure effected by decision of a United States Court of Appeals in such manner as to defeat substantive rights are arbitrary and unjust and warrant the exercise of the supervisory power of this Court.

(2) The New Jersey statute of limitations is Title 2A Chapter 14 of the Revised Statutes; and the pertinent sections (1, 2, 3, and 10) are printed in the Appendix hereto, *infra* p. 16. It is to be noted that under the first section "*Every action* at law for . . . *any tortious injury* to the rights of another not stated in Sections 2A:14-2 and 2A:14-3 . . . shall be commenced within 6 years. . . ." Examination of the second and third sections will indicate that the exceptions mentioned in Section 1 are injuries to the person for which the prescribed period is two years and libel or slander for which the prescribed period is one year. The statute states no other exception whatsoever to the provision that *every action* for any tortious injury to the rights of another shall be commenced within six years. Section 10 covering

actions brought "for any forfeiture upon any penal statute" quite obviously is not an exception to Section 1 but is designed solely to provide a limitation for bringing an action of this anomalous type which is founded neither on tort nor on contract, is not barred by the six year limitation, and except for this section would be of unlimited duration.

No New Jersey court has ever held that any tort action was barred by or governed by the two year period of limitations of Section 10. No New Jersey court has ever held that statutory trebling of damages for a tortious injury takes a case out of Section 1 and brings it within Section 10. Quite the contrary, in *Cruickshanks* v. *Eak*, 33 N. J. Super. 285 (1954) the Superior Court, Law Division, held that an action by a landlord against his tenant for statutory treble damages for commission of waste was not barred by the two year provision of Section 10, but was governed by the six year provision of Section 1.

The Supreme Court of New Jersey in *Addiss* v. *Logan Corporation*, 23 N. J. 142 (1957) does not purport to change the law of New Jersey or to bring any tort action within the two year provision of Section 10 of the statute of limitations. In *Addiss* the plaintiff tenant sued for a statutory penalty under the New Jersey Rent Control Act, N. J. S. 2A:42-38, which provided that any landlord violating the prescribed rent ceiling "shall forfeit to his tenant a sum equal to three times the amount of any rent received in excess of the lawful" prescribed rental; and the court held that the action there provided for the recovery of such forfeiture was within Section 10 of the statute of limitations governing actions brought "for any forfeiture upon any penal statute". The action afforded by the New Jersey Rent Control Act is not based on tort or contract, requires no proof of any injury or damage to the plaintiff, affords no

defenses to the defendant charging more than the prescribed rent, is brought in a summary manner, is heard by a court without a jury, and the judgment is a sum certain arrived at by multiplying the excess rent times three. The Supreme Court of New Jersey inferentially recognizes that the recovery afforded the tenant is not based on tort or in contract so as to bring it within Section 1 and that unless held barred by the two year provision of Section 10 the period for bringing the action would be unlimited. The court most certainly does not indicate or intimate that an action for statutory treble damages for tortious injury would be held to be within the two year provision of Section 10. Quite the contrary, the court in its opinion distinguishes (by use of the symbol "c.f.") the cases of *Cruickshanks* v. *Eak*, *supra*, and *Shelton Electric Co.* v. *Victor Talking Machine Co.* *supra*, which held that actions for statutory treble damages for tortious injury are governed by the six year and not the two year statute of limitations. Inasmuch as the federal courts have exclusive jurisdiction in private antitrust actions, obviously no New Jersey court ever has held or ever could hold that the nature of an action under the antitrust laws was other than, as declared by the federal courts, an action for tortious injury to the rights of another.

Thus it is clear that there is nothing decided by any court of the State of New Jersey or stated by the Supreme Court of New Jersey either by way of decision or *dictum* in its opinion in *Addiss* which required or in any respect warranted the decision of the federal courts for the District of New Jersey shortening the period for the bringing of a private antitrust action from six years to two years. The Supreme Court of New Jersey in *Miller* v. *Board of Chosen Freeholders*, 10 N. J. 398, 403 (1952), has warned that "as a general rule the claim or suit must come clearly within one of the provisions of the statutes of limitation before it is barred, for such a preclusion of action may not be

extended by analogy from one subject to another." The private antitrust action, being to recover for tortious injury to plaintiff's rights, does fall clearly within the six year provision of Section 1 and has consistently been held to be governed by the six year statute of limitations; but now the Court of Appeals by strained analogy brings the action also within another section of the statute of limitations so as to shorten the period prescribed by Section 1 for bringing the action.

Let us assume for purposes of argument that the state court had determined that the two year and not the six year statute of limitations of the state applied in the case of all actions for tortious injury where statutory treble damages were involved. Even in such event, we respectfully submit, the federal courts would not be required or in any respect warranted by reason of the Rules of Decision Act, 28 U. S. C. §1652, to shorten the period for bringing a private antitrust action from the long established six years to two years retroactively so as to bar causes of action which had accrued within the preceding six years without affording reasonable opportunity for the bringing of such actions, or so as to bar pending actions commenced within six years after the cause of action had accrued. *Loeb* v. *Trustees of Columbia Township*, 179 U. S. 472, 21 S. Ct. 174 (1900). Even in such event, we respectfully submit, the impelling force of the due process clause of the Fifth Amendment would both by its very nature and by express provision of 28 U. S. C. §1652, take precedence over the purely procedural requirement of the Rules of Decision Act.

It is respectfully submitted that the instant case presents special and important reasons warranting the exercise of the discretion of this Honorable Court in the allowance of a writ of certiorari to review the decision of the court below, *first* in that the instant case involves questions of general importance, *viz:*

(a) Whether the principles enunciated by this Court under the due process clause of the Fourteenth Amendment in *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra* (against action of a state court depriving the litigant of his day in court by retroactive application of a decision overruling prior state decisions as to procedural requirements) may not properly be invoked under the due process clause of the Fifth Amendment against similar action of a federal court.

(b) Whether the federal courts, having interpreted and applied state procedural law under the Rules of Decision Act, should respond to a decision of the highest state court, supposedly changing such rule of procedure or adjudicating it to be different from the interpretation of the federal courts, in such manner as to effect a retroactive change of procedure barring the pending action of a litigant who has followed the procedure formerly enunciated by the federal courts.

(c) Whether a judicial decision shortening the period of limitation applied retroactively by a federal court so as to bar a pending action is violative of the due process clause of the Fifth Amendment,

and *secondly* in that the destruction by federal judicial decision of petitioner's cause of action by reason of petitioner's failure to comply with procedural requirements which did not exist at the time when its cause of action arose or when its action was instituted is such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Conclusion.

It is respectfully submitted that for the foregoing reasons a writ of certiorari be granted.

Respectfully submitted,

MELVIN J. KOESTLER,
Attorney for Petitioner.

Appendix to Petition.

Constitutional Provision.

Fifth Amendment, Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Statutes.

15 U. S. C. §13

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *

15 U. S. C. §15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws

may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U. S. C. §15b

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

(The source of §15b is the Act of July 7, 1955, the fourth section of which provided that the Act should take effect six months after its enactment.)

28 U. S. C. §1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

New Jersey Statutes.

N. J. S. 2A:14-1

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

N. J. S. 2A:14-2

Every action at law for an injury to the person caused by the wrongful act, neglect, or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

N. J. S. 2A:14-3

Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander.

N. J. S. 2A:14-10

All actions at law brought for any forfeiture upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed.

a. Within 2 years next after the offense committed or to be committed against the statute, when the forfeiture is or shall be limited by the statute to the state of New Jersey only;

b. Within 2 years next after the offense committed or to be committed against the statute, or cause of action accrued, when the benefit of the forfeiture and the action therefor is or shall be limited or given to the party aggrieved; • • •

N. J. S. 2A:42-38

Any landlord who shall violate any provision of this act, or of any order of a county rent control agency, or of a county rent control review board made pursuant to this act, shall forfeit to his tenant a sum equal to three times the amount of any rent received by him from his tenant in excess of the lawful base rental and of any rent increase allowed by the county rent control agency, county rent control review board, or by the court, but not in excess of one year's lawful rent, to be recovered in an action in the county district court. Every such action may be brought in a summary manner and shall be heard by the court without a jury. Judgment may be rendered for any amount which is found to be due to the tenant under the provisions of this section. (N. J. Laws 1953, Ch. 216 §25.)

Opinion and Judgment.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,489.

DEAN OIL COMPANY,
A Corporation,

Appellant,

v.

AMERICAN OIL COMPANY,
A Corporation.

Appeal from the United States District Court for the District of New Jersey.

Argued May 9, 1958
Before GOODRICH, McLAUGHLIN and HASTIE,
Circuit Judges.

Opinion of the Court.

(Filed May 20, 1958.)

Per Curiam:

This is an appeal from a judgment for the defendant in a suit brought under the Robinson-Patman Act in New Jersey. The appeal invites us to overrule our decision in *Gordon* v. *Loew's Inc.*, 247 F. 2d 451 (1957). The appellant also suggests some distinction between his case and that presented in *Gordon* v. *Loew's*. We do not see the force of the attempted distinction and we are of no mind to overrule the *Gordon* case.

The judgment of the district court will be affirmed.

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

May 20, 1958.